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No. 82-1564

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH LONEWOLF, APPELLANT

v.

THERESA REY LONEWOLF

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over the appeal in this case under 28 U.S.C. 1257(2).

2. Whether, in a divorce proceeding involving an Indian spouse and a non-Indian spouse whose marital domicile was on the Santa Clara Pueblo, the New Mexico state court had jurisdiction to award to the non-Indian spouse a share of the value of property created by the Indian spouse and located on the Pueblo.

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THERESA REY LONEWOLF

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This Brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Joseph Lonewolf and Theresa Lonewolf, appellant and appellee respectively, were married in 1951 in the State of New Mexico pursuant to a state marriage license (J.S. App. 39; Mot. to Dis. or Aff. 1-2). For approximately 20 years, the Lonewolfs lived on non-Pueblo lands, but in 1972 they moved to the Santa Clara Pueblo and lived in a house on land owned by the Pueblo and assigned to appellant (J.S. App. 30; Mot. to Dis. or Aff. 2). Appellant is an Indian and is an enrolled member of the Santa Clara Pueblo, but Mrs. Lonewolf is a non-Indian and is not a member of the Pueblo. The couple's three children, all of whom are over the age of 21, are enrolled members of the Pueblo (J.S. 11, 14; J.S. App. 40).

The Lonewolfs separated on or about February 11, 1979 (J.S. App. 39, 42). Mrs. Lonewolf thereafter filed a petition for legal separation in the District Court for

the First Judicial District of the County of Rio Arriba, New Mexico, on March 26, 1979 (*id.* at 39-43). She sought, *inter alia*, interim relief prohibiting appellant from disposing of community property and an order requiring appellant to show cause why she should not have possession of a vehicle and the house on the Pueblo and why a temporary order restraining appellant from disposing of property should not be made final (*id.* at 42). In his April 2, 1979 response to the order to show cause, appellant asserted that the state court lacked jurisdiction over the dwelling and other property located on the Pueblo (*id.* at 44).

On April 27, 1979, appellant filed an answer to the petition for separation and counterclaimed for divorce (J.S. App. 46-51). In his answer, appellant noted that the request for relief pendente lite had been rendered moot by an agreement between the parties (*id.* at 46). In his accompanying counterclaim for divorce, appellant contended that the state district court had jurisdiction to grant the parties a divorce because of Mrs. Lonewolf's residence (*id.* at 49),[1] but he again maintained that all property acquired by the parties during the marital relationship was subject to the jurisdiction of the Pueblo of Santa Clara, not the state court. He therefore requested the state court to determine that the Santa Clara Tribal Court had jurisdiction over all matters pertaining to the couple's property (*id.* at 49). Appellant also requested "an equitable division of the community debts" and "such other and further relief as to the Court may seem proper" (*ibid.*). The court entered an order dissolving the marriage on December 13, 1979 (*id.* at 30). Mrs. Lonewolf asserts that she moved off the Pueblo at some point after the separation (Mot. to Dis. or Aff. 2), but she does not identify precisely when she did so. Mrs.

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[1] The relevant New Mexico statute confers jurisdiction on the state district court to grant a divorce when either party has resided in New Mexico for at least six months and has a domicile in the state. N.M. Stat. Ann. § 40-4-5 (1978) (see J.S. App. 52).

Lonewolf did testify, however, that the couple's marital domicile was on the Pueblo until the time of the divorce in December 1979 (May 7, 1981 Tr. 65).

The district court held that it had no jurisdiction over lands located on the Santa Clara Pueblo[2] but that it did have jurisdiction over the parties' personal property, whether located on or off the Pueblo (J.S. App. 35). The parties then entered into a stipulation providing for the distribution of most of the couple's personal property and debts, and the court approved that stipulation (*id.* at 31, 32, 36). The parties could not agree, however, on the division of certain items of Indian pottery made by appellant, a potter with a studio and gallery on the Pueblo. After a hearing regarding the pottery, the whereabouts of which were unknown, the court valued it in excess of $56,000 and ordered appellant to pay Mrs. Lonewolf $18,309, representing one-half of the value of the pots less certain deductions in appellant's favor. After entry of judgment, a writ of garnishment was executed against appellant's account in a bank located off the Pueblo to satisfy this amount, but the writ was dissolved after appellant deposited the required amount with the state court (J.S. App. 22; Mot. to Dis. or Aff. 3).[3]

Appellant appealed to the Supreme Court of New Mexico from that portion of the trial court's judgment regarding the pottery, and the Supreme Court of New Mexico affirmed (J.S. App. 20-26). The court reasoned that rights to personal property were not tied to lands

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[2] The court found that at the time of separation and for several years prior thereto, the parties occupied a dwelling located on the Santa Clara Pueblo and leased under an agreement between appellant and the All Indian Housing Authority. The court further found that Mrs. Lonewolf, as a non-Indian, could have no rights to lands located on the Pueblo and that such lands are not subject to alienation and may be passed on only to other members of the Pueblo (J.S. App. 30-31).

[3] See also Appellant's Brief in Chief in the Supreme Court of New Mexico at 2; Appellee's Answer Brief in the Supreme Court of New Mexico at 4-6.

within the Pueblo and that Mrs. Lonewolf's right under New Mexico law to control and dispose of community property (see N.M. Stat. Ann. § 40-3-14 (1978)) traveled with her off the Pueblo (J.S. App. 24). In the Supreme Court's view, once the district court had jurisdiction to dissolve the marriage, it had jurisdiction to determine the proper distribution of the couple's community property (*id.* at 24-25). The Supreme Court further held that appellant had submitted to the state court's jurisdiction when he filed his counterclaim for divorce and when he entered into a stipulation for the distribution of personal property other than the pottery and that he could not subsequently deny jurisdiction specifically as to the pottery (*id.* at 25).

DISCUSSION

We agree with appellee that an appeal does not lie to this Court under 28 U.S.C. 1257(2) from the decision of the Supreme Court of New Mexico because the validity of a state statute was not drawn in question in the courts below. If the Court agrees and therefore treats the papers whereon the appeal is taken as a petition for a writ of certiorari, we submit that this case does not warrant plenary consideration because the precise circumstances of the case are both atypical and somewhat unclear and because the question of jurisdiction to order a division of property in a divorce involving an Indian and non-Indian spouse has not received extensive consideration by the state courts. That question is, however, somewhat related to the question presented in *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, cert. granted, No. 82-629 (Apr. 25, 1983). In the latter case, the issue is whether a state court has jurisdiction over a civil action brought by an Indian Tribe against a non-Indian defendant concerning matters arising on an Indian reservation. The Court therefore may wish to hold the jurisdictional statement in this case pending a decision in *Three Affiliated Tribes*.

1. a. Under 28 U.S.C. 1257(2), this Court has appellate jurisdiction over a final judgment rendered by the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." An appeal lies under this Section whether the validity of the state statute was challenged on its face or as applied. *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282 (1921). On the other hand, this Court has certiorari jurisdiction under 28 U.S.C. 1257(3) to review the judgment of a state court where, *inter alia*, "any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In construing these provisions, the Court consistently has distinguished between cases in which a state statute has been attacked as applied and those in which a party has resisted a particular exercise of state authority on the ground of a federal immunity without actually contesting the validity of a state statute. Only cases in the former category are within the Court's appellate jurisdiction under 28 U.S.C. 1257(2), even though the exercise of state power challenged in cases in the latter category may be authorized by a state statute.[4]

For example, in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), which involved the right of access of the public and the press to criminal trials, a

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[4] A related question of this Court's appellate jurisdiction under 28 U.S.C. 1254(2) over a judgment of a federal court of appeals where the validity of a state statute is involved is presented in *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (argued Oct. 4, 1983). We have argued in *Silkwood* that principles developed under 28 U.S.C. 1257(2) should be applied under 28 U.S.C. 1254(2) as well. See U.S. Br. as Amicus Curiae at 2-10. The Court therefore may wish to hold the jurisdictional statement in this case pending the decision in *Silkwood*. The interpretation of 28 U.S.C. 1254(2) in this regard also is involved in *Besadny* v. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, appeal pending, No. 83-6.

state statute provided that the trial court, in its discretion, could exclude from a trial any persons whose presence would impair the conduct of a fair trial if the right of the accused to a public trial was not violated. 448 U.S. at 560 n.2. The Court nevertheless held that jurisdiction by appeal did not lie under 28 U.S.C. 1257(2), explaining (448 U.S. at 562-563 n.4):

> "It is essential to our jurisdiction on appeal • • • that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 185 (1945). Appellants never explicitly challenged the statute's validity. In both the trial court and the State Supreme Court, appellants argued that constitutional rights of the public and the press prevented the court from closing a trial without first giving notice and an opportunity for a hearing to the public and the press and exhausting every alternative means of protecting the defendant's right to a fair trial. Given appellants' failure explicitly to challenge the statute, we view these arguments as constituting claims of rights under the Constitution, which rights are said to limit the exercise of the discretion conferred by the statute on the trial court.

The Court also has dismissed appeals where a party has alleged that the federal Constitution prevents the exercise of jurisdiction by a state court but where the party has not explicitly challenged the validity of the state statute authorizing the assertion of that jurisdiction. See *Kulko* v. *California Superior Court*, 436 U.S. 84, 90 n.4 (1978); *Hanson* v. *Denckla*, 357 U.S. 235, 244 n.4 (1958).[8]

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[8] The Court has taken a similar view where a party has asserted a federal immunity to state taxing power. *Rohr Aircraft Corp.* v. *San Diego County*, 362 U.S. 628, 629-630 (1960); *Wilson* v. *Cook*, 327 U.S. 474, 480-482 (1946); *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-187 (1945); *Memphis Natural*

We do not doubt that appellant properly could have framed his contentions in the state courts as an attack on the validity, as applied to personal property located on the Pueblo, of the New Mexico statutes authorizing a court entertaining an action for dissolution of marriage to divide the spouses' property. Cf. *McCarty* v. *McCarty*, 453 U.S. 210, 219-220 n.12 (1981). Indeed, this Court, often without discussion, has entertained appeals from state courts in cases involving the application to Indians of a state law that was said to conflict with federal law or infringe upon the federally protected sovereignty of the Tribe.[6] But, as we explain below, appellant did not frame his argument in state court as an attack on the relevant state statutes, and that is critical to the existence of appellate jurisdiction. The Court has made clear that jurisdiction under 28 U.S.C. 1257(2) often depends upon the manner in which the parties have

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Gas Co. v. *Beeler*, 315 U.S. 649, 650-651 (1942); *Citizens National Bank* v. *Durr*, 257 U.S. 99, 106 (1921). See also *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-441 (1979). In a number of more recent cases, the Court has not discussed the jurisdictional issue involved here in entertaining appeals from state courts under 28 U.S.C. 1257(2) to consider the validity of a state tax as applied to certain income or property. See, *e.g.*, *ASARCO, Inc.* v. *Idaho State Tax Comm'n*, No. 80-2015 (June 29, 1982); *F. W. Woolworth Co.* v. *Taxation & Revenue Dep't*, No. 80-1745 (June 29, 1982); *Xerox Corp.* v. *County of Harris*, No. 81-1489 (Dec. 13, 1982); *Memphis Bank & Trust Co.* v. *Garner*, No. 81-1613 (Jan. 24, 1983); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, No. 81-1839 (Mar. 29, 1983); *Container Corp.* v. *Franchise Tax Board*, No. 81-523 (June 27, 1983).

[6] See, *e.g.*, *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982), slip op. 4; *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *United States* v. *John*, 437 U.S. 634, 637-638 (1978); *Antoine* v. *Washington*, 420 U.S. 194, 197 (1975); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973); *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U.S. 685, 686 n.1 (1965).

structured their arguments. See *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 650-651 (1942).[7]

b. In his formal pleadings in the state trial court, appellant contended that the court had no "jurisdiction" over property located on the Santa Clara Pueblo, but he did not cite any particular state statute or seek a declaration that any such statute is invalid on the ground of its repugnancy to federal law or the Constitution (J.S. App. 44, 46, 49).[8] The trial court concluded that it did "have jurisdiction over the personal property which is the community property of the parties, whether the same is located on or off the reservation" (J.S. App. 35), but the court likewise did not cite a specific statute or indicate that it was sustaining a statute against a challenge to its validity under federal law.

Moreover, as appellee notes (Mot. to Dis. or Aff. 5), in his briefs in the Supreme Court of New Mexico, appellant again did not cite any state statute or contend that any such statute is invalid. His argument essentially was that the exercise of jurisdiction by the trial court was inconsistent with federal law and infringed upon the right of the Indians to make their own laws. Appellant's Brief in Chief at 3-8, 14; Appellant's Reply Brief at 1-5, 9-12. Especially in light of appellant's failure even to cite a state statute, we believe this argument should be understood as an assertion that federal law or the federally protected sovereignty of the Tribe conferred an immunity from the exercise of jurisdiction by the state court, rather than an attack on the validity of

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[7] See also 12 Moore, Bendix & Ringle, *Moore's Federal Practice* ¶ 513.01, at 8-80 to 8-81 (2d ed. 1982); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4012, at 616, 617-618 (1977); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 637-640 (2d ed. 1973); Stern & Gressman, *Supreme Court Practice* 163-165 (5th ed. 1978).

[8] Compare U.S. Mot. to Dis. in Part and Aff. in Part at 10, *Bessdny* v. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* (No. 83-6, 1983 Term) (28 U.S.C. 1254(2)).

the state statutes that confer jurisdicion on the court and empower it to divide property.

The opinion of the Supreme Court of New Mexico supports this conclusion. The Supreme Court stated that the issue on appeal was whether "the New Mexico district court had jurisdiction to determine the disposition of community personal property located on the Santa Clara Reservation when one of the parties is an enrolled member of the Pueblo of Santa Clara" (J.S. App. 21), and the Court stated that the test "for exercise of state court jurisdiction" over matters involving Indian Tribes is "whether the state infringed on the right of reservation Indians to make their own laws and be ruled by them" (*id.* at 22-23, quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)). There was no reference to state statutes in this portion of the opinion. These statements therefore suggest that the Supreme Court likewise viewed the issues presented not in terms of the validity of the statutes as such, but rather in terms of whether the trial court's exercise of its jurisdiction infringed upon a federally protected right or immunity. The case therefore resembles *Richmond Newspapers, Inc.* v. *Virginia*, *Kulko* v. *California Superior Court*, and *Hanson* v. *Denckla*, *supra*, in which this Court held that an appeal did not lie under 28 U.S.C. 1257(2).[9] The appeal accordingly should be dismissed for lack of jurisdiction.[10]

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[9] To be sure, the Supreme Court of New Mexico did cite several state statutes elsewhere in its opinion, noting that "Mrs. Lonewolf properly invoked the jurisdiction of the district court for dissolution of the marriage, Section 40-4-5, N.M.S.A., and for division of the property, Section 40-4-7, N.M.S.A. 1978" (J.S. App. 24). This statement, however, appears to be nothing more than a description of Mrs. Lonewolf's invocation of state procedures, rather than an indication that the validity of the cited state statutes was at issue.

[10] We do not agree with appellee (Mot. to Dis. or Aff. 5) that appellant did not sufficiently raise in state court the question whether the assertion of jurisdiction over the pottery would infringe upon the right of the Indians to make their own laws and be governed by them. It is true that the principal theme of appel-

2. It is our view that the Supreme Court of New Mexico erred in holding that, in the absence of the assumption by New Mexico of jurisdiction pursuant to Public Law 280,[11] the state trial court had jurisdiction

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lant's argument in the Supreme Court of New Mexico was that the district court effectively determined who "stole" the missing pots when it awarded Mrs. Lonewolf one-half of their value (less certain deductions) and that the court therefore in substance improperly exercised criminal jurisdiction over an on-reservation offense involving an Indian. See Appellant's Brief in Chief at 3-5, 9-13. But appellant also argued that the exercise of jurisdiction by the state court interfered with tribal self-government under *Williams* v. *Lee* (Appellant's Brief in Chief at 6-9; Reply Brief at 3-5, 9-11), and the Supreme Court of New Mexico addressed appellant's arguments in those terms (J.S. App. 22-25). This was sufficient to permit the exercise of jurisdiction under 28 U.S.C. 1257. See *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 2-8.

Appellant also identifies (J.S. 2) as a separate question presented the question whether New Mexico's application of its community property laws to determine the character and nature of personal property created and held on the Pueblo impermissibly infringed on the power of the Indians to make their own laws and be governed by them. This precise issue was not separately addressed in the courts below. Nevertheless, in the circumstances of this case, we believe that the propriety of the application of the state's community property laws is fairly subsumed in the broader issue of the state's exercise of "jurisdiction" over the property and that consideration of this issue therefore would be appropriate as well if the Court were to grant review in this case.

[11] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. Although Public Law 280 permits a state to assume jurisdiction over divorces involving Indians (see *Bryan* v. *Itasca County*, 426 U.S. 373, 384 n.10 (1976)), New Mexico has not acquired civil jurisdiction under Public Law 280. *Chino* v. *Chino*, 90 N.M. 203, 206, 561 P.2d 476, 479 (1977). This factor distinguishes the decision in *Sheppard* v. *Sheppard*, 104 Idaho 1, 655 P.2d 895 (1982), the only other decision we have located that arose out of similar facts. There, the Idaho Supreme Court held that the state trial court, in a divorce proceeding brought by a non-Indian spouse against an Indian spouse, had jurisdiction to order a division of the couple's property located on the reservation and to order the Indian spouse to reimburse the non-Indian spouse for the latter's share of the community property used to purchase a trust asset. However, the Idaho Supreme Court relied on the enactment of Public Law 280 for the assertion of jurisdiction in the case. 655 P.2d at 906-908. See also *Fisher* v.

in this divorce proceeding to award Mrs. Lonewolf a share of the value of the pottery made by appellant on the Pueblo. However, treating the papers whereon the appeal is taken as a petition for a writ of certiorari, we do not believe the case merits plenary review.

a. Although the circumstances of the controversy make it difficult to fit this case precisely within established principles governing the exercise by a State of jurisdiction over Indians and reservation matters, it nevertheless is useful to reiterate those principles at the outset and to identify the relative interests of the Tribe and and the State.

It is, of course, well settled that an Indian Tribe, as an inherent attribute of its sovereignty, has exclusive jurisdiction over matters relating to the domestic relations of its members, at least insofar as concerns conduct on the reservation. See, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 564 (1981); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55-56 (1978); *United States* v. *Wheeler*, 435 U.S. 313, 322 n.18 (1978); *Fisher* v. *District Court*, 424 U.S. 382, 386-389 (1976); *United States* v. *Quiver*, 241 U.S. 602 (1916). Cf. *New Mexico* v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 8-9; *DeCoteau* v. *District County Court*, 420 U.S. 425, 428-430 & n.3 (1975). This view is reflected in the Indian Child Welfare Act of 1978, 25 U.S.C. (Supp. V) 1901 *et seq.*, which provides that an Indian Tribe shall have exclusive jurisdiction over custody proceedings involving an Indian child domiciled or residing on the reservation, except where jurisdiction is otherwise vested in the State by existing federal law. 25 U.S.C. (Supp. V) 1911(a).[12] Consistent with these principles, there would

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Fisher, 104 Idaho 68, 656 P.2d 129 (1982) (similar case in which both spouses were Indians). The decision in *Sheppard* v. *Sheppard* therefore does not suggest that a state court would have such jurisdiction even in the absence of Public Law 280, as the New Mexico Supreme Court held here.

[12] The authority of an Indian Tribe in the area of domestic relations is closely related to the long-recognized power of a Tribe

seem to be little doubt that an Indian Tribe retains inherent jurisdiction over the dissolution of a marriage between two of its members who are domiciled on the reservation and over the division and distribution of the spouses' property in connection with that dissolution, at least insofar as that property is situated on the reservation. See, *e.g.*, *Conroy* v. *Conroy*, 575 F.2d 175 (8th Cir. 1978); *Marris* v. *Sockey*, 170 F.2d 599 (10th Cir. 1948), cert. denied, 336 U.S. 914 (1949); *Yakima Joe* v. *To-Is-Lap*, 191 F. 516 (D. Or. 1910); *Raymond* v. *Raymond*, 83 F. 721 (8th Cir. 1897); F. Cohen, *Handbook of Federal Indian Law* 120, 137-139 (1942); cf. *Begay* v. *Miller*, 70 Ariz. 380, 222 P.2d 624 (1950); *In re Red Fox & Red Fox*, 23 Or. App. 393, 399, 542 P.2d 918, 921 (1975). See also 25 C.F.R. 11.28(a).

However, just as a Tribe has a compelling interest in the regulation of the domestic relations of its members who reside on the reservation, so too this Court has recognized that a State has a paramount interest in the domestic relations of a husband and wife within its borders. See, *e.g.*, *Ridgway* v. *Ridgway*, 454 U.S. 46, 54-55 (1981); *McCarty* v. *McCarty*, 453 U.S. 210, 220 (1981); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979); *Williams* v. *North Carolina*, 317 U.S. 287, 298-299 (1942); *In re Burrus*, 136 U.S. 586, 593-594 (1890). As a result, we believe that a state ordinarily would have exclusive jurisdiction over the domestic relations of two non-Indian spouses, even if they reside on an Indian reservation and even with respect to the spouses' real or personal property situated on the reservation. Cf. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973); *Williams* v. *Lee*, 358 U.S. at 220; *United States* v. *McBratney*, 104 U.S. 621 (1881).

This case, of course, does not fit into either of the categories just discussed, because it involves the dissolu-

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to establish rules regarding membership and to govern the inheritance of property. See *Montana* v. *United States*, 450 U.S. at 564; *United States* v. *Wheeler*, 435 U.S. at 322 n.18; *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 55.

tion of a marriage between an Indian and a non-Indian who is not a member of the Tribe.[13] In such a case, where the spouses were domiciled on an Indian reservation within the State, the interests of both the Tribe and the State are implicated (*McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 179), especially if the non-Indian spouse resides off the Indian reservation.[14] This Court has formulated principles in other settings for the resolution of disputes involving Indians and non-Indians in connection with matters arising on an Indian reservation, and those decisions furnish some guidance for resolving the jurisdictional issue here as well.

In its seminal decision in *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court held that an Arizona state court did not have jurisdiction over a suit brought by the non-Indian owner of a store on the Navajo Indian Reservation against a Navajo Indian and his wife to collect the amount owed for goods sold to them on credit. The suit instead had to be brought in the tribal court, which had been granted jurisdiction over suits by outsiders against Indian defendants. 358 U.S. at 222. The Court concluded that the exercise of jurisdiction by the state court in these circumstances "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. See also *Kennerly* v. *District Court*, 400 U.S. 423 (1971); *Fisher* v. *District Court*, 424 U.S. at 386. But while such suits against Indians in state court are barred, this Court has made

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[13] Mrs. Lonewolf did not (and could not) become a member of the Santa Clara Pueblo after her marriage to appellant. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 52 & n.2. As a result, there is no occasion here to consider whether a Tribe would have exclusive jurisdiction over the divorce of an Indian and a non-Indian who is a member of the Tribe. See 19 Op. Att'y Gen. 109 (1888); cf. *Nofire* v. *United States*, 164 U.S. 657 (1897).

[14] As noted above (see page 2, *supra*), Mrs. Lonewolf apparently moved off the Pueblo at some point after she and appellant separated, but it is not clear when she did so.

clear that suits by Indians against non-Indians in state court concerning matters arising on an Indian reservation do not impermissibly interfere with the right of the Indians to make their own laws and be governed by them. See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 171, 173; *Williams* v. *Lee*, 358 U.S. at 219-220. See also *Felix* v. *Patrick*, 145 U.S. 317, 332 (1892); *United States* v. *Candelaria*, 271 U.S. 432, 444 (1926). See generally U.S. Br. at 6-15, *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.* (No. 82-629, 1983 Term).

If these principles were to be applied rigidly in the domestic relations setting, the result would be that a state court would be wholly barred by federal law from entertaining an action for divorce (or, as here, for legal separation) brought by a non-Indian against an Indian if the marital domicile was on the reservation. We do not believe, however, that the holding in *Williams* v. *Lee* requires a complete bar to the exercise by a state court of jurisdiction in these circumstances. Rather, as we explain below, drawing on principles of a "divisible" divorce developed in this Court's cases regarding the interstate aspects of divorce, it is our view that a state court has the authority to affect the marital status of the non-Indian spouse by dissolving the marriage, but does not have jurisdiction to order a division of the property.

b. In *Williams* v. *North Carolina*, *supra*, the Court held that "each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." 317 U.S. at 298-299. This is so even though the marital domicile of the couple was in another State, and such a decree must be given full faith and credit in the State of marital domicile. *Id.* at 298-304, overruling *Haddock* v. *Haddock*, 201 U.S. 562 (1906). By analogy, in the area of state and tribal jurisdiction over domestic relations, a state court could

grant a divorce to the non-Indian spouse even if the court would not ordinarily have jurisdiction over actions brought against an Indian residing on the reservation in connection with matters arising on the reservation.

This result is perhaps clearest where the non-Indian spouse moved off the reservation and abandoned his or her domicile there before suing for divorce, for then the parallel to the situation of a spouse moving to another State would be complete. But we believe that the state court could grant a divorce to the non-Indian spouse even if he or she continued to reside on the reservation. This Court has stressed that, absent a governing federal statute, whether a State may exercise jurisdiction over activities of a non-Indian on a reservation requires a particularized inquiry into the relative interests at stake. See, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, slip op. 9-11; *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, slip op. 4-7, 13-14; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144-145 (1980). The interest of a State in the marital status of the non-Indian spouse in these circumstances (see *Williams* v. *North Carolina*, 317 U.S. at 298-299) would appear to be sufficient to permit the state court to alter that status, even though the Tribe, too, has an important interest in the marital relationship by virtue of its authority over the Indian spouse and the fact that the couple's marital domicile was on the reservation (cf. *id.* at 302-304).

It does not follow, however, that a state court also has jurisdiction to order a division of property in these circumstances—at least where, as here, the property is situated on the reservation. In *Estin* v. *Estin*, 334 U.S. 541, 546-549 (1948), the Court held that a state court in Nevada, in granting a divorce to a husband who became domiciled there in proceedings against a wife who was not served and did not appear, could not affect the property rights of the absent spouse under a decree of separation and alimony in New York. The result, the

Court observed, "is to make the divorce divisible" and thereby "accommodate[] the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern." *Id.* at 549. See also *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957). In our view, the same principle governs here.

To be sure, in a divorce action by a non-Indian spouse against an Indian spouse, the question as regards the power of the state court to order a division of property is not whether the court has personal jurisdiction over the absent spouse, but whether the court has subject matter jurisdiction over the action, insofar as the non-Indian seeks a division of property, in light of the Indian status of the other spouse. The policy considerations, however, are quite similar, for where the marital domicile was on the reservation and the property is located there, the Tribe, not the State, would appear to have the "dominant concern" [15] in the disposition of the property. Accordingly, drawing by analogy on *Estin* v. *Estin* and *Vanderbilt* v. *Vanderbilt*, in a divorce proceeding filed by a non-Indian against an Indian where the couple had been domiciled on the reservation, the state court cannot order a division of property situated on the reservation [16]—at least where, as here, the tribal court would have jurisdiction to order a division of that property.[17]

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[15] *Estin* v. *Estin*, 334 U.S. at 549.

[16] Because the only property remaining in issue in this case (the pottery) concededly was created and located on the Pueblo, there is no occasion to consider whether a state court could order the division of property located off the reservation if the property was closely related to the couple's marriage and domicile on the reservation or the Indian spouse's activities there. Cf. *Morton* v. *Ruiz*, 415 U.S. 199 (1974).

[17] The then-Governor of the Santa Clara Pueblo testified that the tribal court would have jurisdiction in a case such as this, but that the Pueblo ordinarily would honor a request that the dispute be submitted to state court (Tr. 40-41, 46-47; see also 25 C.F.R. 11.22).

This conclusion is strongly supported by *Williams* v. *Lee*, in which the Court held that an action by a non-Indian against an Indian to collect on a debt arising out of matters on the reservation could not be brought in state court but instead had to be brought in tribal court.

c. If the foregoing principles are applied to the instant case, it is clear that the state court had jurisdiction over Mrs. Lonewolf's petition for legal separation from Mr. Lonewolf [18] but not over her accompanying request for division of the couple's community property located on the Pueblo. This case is made somewhat more complicated, however, by the fact that appellant counterclaimed for divorce (J.S. App. 48). The Supreme Court of New Mexico held that as a result of this counterclaim, appellant had "submitted to the district court's jurisdiction" and "cannot now deny jurisdiction specifically as to the pottery" (*id.* at 25).[19] This conclusion was erroneous.

As an initial matter, the question is not whether personal jurisdiction over appellant could be obtained by his "submitting" to the court's jurisdiction; the question is whether the trial court had subject matter jurisdiction to award Mrs. Lonewolf a share of the value of the pottery in view of appellant's status as an Indian. When appellant counterclaimed for divorce, he was essen-

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[18] If the state court could alter the marital relationship by dissolving the marriage, we do not believe the court would be foreclosed from granting a formal separation, to the extent this simply altered the status of the parties. It is not clear, however, what independent significance such a decree would have under New Mexico law.

[19] The Supreme Court also held that appellant had submitted to the jurisdiction of the trial court by entering into a stipulation for the division of all items of personal property except the pottery (J.S. App. 25). It appears, however, that this stipulation was entered into only after the trial court held that it had jurisdiction over all personal property. Accordingly, appellant's entering into a stipulation regarding the property cannot be viewed as a voluntary submission to the trial court's jurisdiction with respect to that property.

tially in the position of an Indian plaintiff in a suit against a non-Indian defendant, and this Court long has recognized that such a suit is not inconsistent with the federally protected sovereignty of the Tribe. But in his counterclaim, appellant once again explicitly asserted that the trial court did not have jurisdiction over property on the Pueblo. In our view, the state trial court could not, consistent with *Williams* v. *Lee*, exercise jurisdiction over Mrs. Lonewolf's request that it award her a portion of on-reservation *property* in which appellant had an interest simply because appellant filed a limited and separate request that the trial court alter the couple's *status*. As explained above, this Court elsewhere has recognized that a divorce appropriately may be regarded as "divisible" into aspects relating to status and property in order to accommodate the interests of separate jurisdictions. New Mexico law reflects the same view: it recognizes that the dissolution of a marriage and the division of property are separate matters that need not be accomplished in the same proceedings. N.M. Stat. Ann. § 40-4-3 (1978) (division of property may be granted without dissolving the marriage); N.M. Stat. Ann. § 40-4-20 (1978) (division of property may be accomplished in a separate suit after dissolution of the marriage). These principles apply equally here to the separate interests of the Tribe and the State.[20]

In holding that the state trial court had jurisdiction, the New Mexico Supreme Court observed that rights to personal property were not tied to lands within the reservation and that Mrs. Lonewolf had a right under New Mexico law to control and dispose of the community prop-

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[20] Appellant did request a division of the couple's community debts even though he objected to jurisdiction over on-reservation property (J.S. App. 49), but the Supreme Court of New Mexico did not rely on this fact in finding that the state court had jurisdiction. In our view, the court properly could have declined to grant appellant relief with regard to the community debts or other relief beyond dissolution of the marriage if petitioner did not also request a division of community property.

erty (see N.M. Stat. Ann. § 40-3-14 (1978)) that traveled with her and therefore could be adjudicated in state court. This reasoning also is flawed. The Court too quickly assumed that New Mexico law would apply on the reservation to confer on Mrs. Lonewolf a right to control and dispose of the pottery. In our view, tribal, not state, law would govern the rights of an Indian and a non-Indian spouse domiciled on an Indian reservation in property located on the reservation—especially where, as here, a non-Indian spouse asserts an interest in property (the pottery) that concededly was created by the Indian spouse on the reservation. Thus, a reference to the source of the governing law supports a finding of tribal, not state, jurisdiction over the division of the property in question. In this connection, we note that under New Mexico law, as under the law of most community property jurisdictions, the rights of spouses domiciled in New Mexico to property acquired while the spouses were domiciled in another State are governed by the law of the other State. See *Brenholdt* v. *Brenholdt*, 94 N.M. 489, 612 P.2d 1300 (1980); *Hughes* v. *Hughes*, 91 N.M. 339, 573 P.2d 1194 (1978). There is no reason for a different result when the couple was domiciled on an Indian reservation.

3. Although it is our view that the Supreme Court of New Mexico erred in holding that the state trial court had jurisdiction to award Mrs. Lonewolf a share of the value of the pottery made by appellant, we do not believe that plenary review should be granted here. Insofar as we have been able to ascertain, the question of the extent of state court jurisdiction over a dissolution of the marriage between an Indian and non-Indian and accompanying division of property in the absence of an assumption of jurisdiction by the State under Public Law 280 has not been extensively considered by the state courts or given rise to conflicting decisions. See note 11, *supra*. Moreover, this case involves somewhat unusual circumstances, because it was the Indian who

sought a divorce in state court as well as certain additional relief.[21]

CONCLUSION

The appeal should be dismissed for lack of jurisdiction under 28 U.S.C. 1257(2). Treating the papers whereon the appeal is taken as a petition for a writ of certiorari, the petition should be held and disposed of in light of this Court's decision in *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, No. 82-629. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[21] In addition, on December 9, 1981, after this case was decided by the trial court, the Santa Clara Tribal Code was amended in several respects that, although somewhat unclear, might have an impact on similar cases in the future. For example, Title X, Section 23.2 of the new Code provides that the Tribal Court shall have jurisdiction over the marriage, divorce and related matters concerning members of the Santa Clara Pueblo and that a divorce obtained in another jurisdiction shall be of no force in the Pueblo if both parties were domiciled on the Pueblo at the time it was sought. It is unclear whether the latter provision is intended to apply where, as here, one of the parties to a marriage is a non-Indian. See also Title II, Section 22 (general jurisdictional provisions). We have lodged with the Clerk of this Court a copy of the provisions of the Tribal Code that were furnished to us by counsel for petitioner.

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